

No. 82-1706

Office-Supreme Court, U.S.

FILED

MAY 24 1983

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

PETER B. CEPPI, EXECUTOR OF THE ESTATE OF
JANE B. CEPPI, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question presented in this federal estate tax case is whether an amendment to Section 2035 of the Internal Revenue Code of 1954 (26 U.S.C. & Supp. V), enacted on November 6, 1978, that limited the application of the exclusion from a decedent's gross estate for certain gifts made within three years before death, may constitutionally be applied to gifts made on January 5, 1978.¹

The pertinent facts may be summarized as follows: The decedent, Jane B. Ceppi, died on January 15, 1978. Ten days prior to her death, on January 5, 1978, the decedent made gifts of stock to eight different donees. The value of each gift was \$6,477.75 on January 5, 1978, and \$6,585 on

¹The opinion of the court of appeals (Pet. App. A-1 to A-15) is reported at 698 F.2d 17.

January 15, 1978. On the estate tax return filed by petitioner, the eight gifts were reported as transfers made within three years of death (Pet. App. A-2 to A-3). Under Section 2035(a) of the 1954 Code, such gifts are includable in the gross estate for estate tax purposes, except to the extent excludable under Section 2035(b) (& Supp. V).

Section 2035(b)(2) (& Supp. V), as amended by Section 2001(a)(5) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1848, App., *infra*, 1a, provided an exception for —

any gift excludable in computing taxable gifts by reason of section 2503(b) (relating to \$3,000 annual exclusion for purposes of the gift tax) * * *.

Relying upon this exclusion, petitioner subtracted \$3,000 from the estate tax value of each of the eight gifts (Pet. App. A-3).

The Commissioner disallowed the exclusions claimed by petitioner, and determined an estate tax deficiency of \$7,296 (Pet. App. A-4). In the Commissioner's view, Section 2035(b)(2) of the 1954 Code (& Supp. V) permitted an exclusion only for "*any gift excludable in computing taxable gifts*" (emphasis added). Because each of the decedent's gifts of \$6,477.75 exceeded \$3,000 and none of them was entirely excludable for gift tax purposes, the Commissioner reasoned that no part of any such gift could be excluded for estate tax purposes. The Commissioner's interpretation is commonly referred to as the "de minimis" method, because it allows an exclusion only when the total gifts to a donee during the year are worth \$3,000 or less.

Petitioner, on the other hand, utilized a "subtraction out" method. In essence, petitioner urged that the estate tax exclusion should be determined in the same fashion as the gift tax exclusion. Under Section 2503(b) of the 1954 Code (& Supp. V), App., *infra*, 2a, an exclusion from taxable gifts

is allowed for up to \$3,000 in gifts of certain property to a single donee in a single year, even when the actual gifts exceed \$3,000. Thus, petitioner urged that under Section 2035(b)(2) (& Supp. V), as amended by the Tax Reform Act of 1976, \$3,000 similarly may be "subtracted out" of each gift of \$6,477.75 for purposes of computing the value of the gross estate.

In 1978, however, Congress amended Section 2035(b)(2) (& Supp. V) in order to make it clear that it intended to enact the "de minimis" method applied by the Commissioner. Section 702(f)(1) of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2930, App., *infra*, 1a. See Staff of Joint Comm. on Taxation, 95th Cong., 2d Sess., *General Explanation of the Revenue Act of 1978*, at 429 (Jt. Comm. Print 1979). The 1978 amendment requires inclusion in the gross estate of the entire amount of gifts (and not just the excess of the value of the gifts over \$3,000) whenever the annual gifts to the same donee are in excess of \$3,000. While the Revenue Act of 1978 was signed into law by the President on November 6, 1978, the amendment of Section 2035(b)(2) (& Supp. V) was made effective with respect to the estates of decedents dying after December 31, 1976, but only in connection with gifts made after that date. See the Revenue Act of 1978, Pub. L. No. 95-600, Section 702(f)(2), 92 Stat. 2930, App., *infra*, 3a.

Finally, in 1980, Congress decided to permit executors to elect the "subtraction out" method instead of the "de minimis" method. Section 107(a)(2)(i) of the Technical Corrections Act of 1979, Pub. L. No. 96-222, 94 Stat. 223, App., *infra*, 3a. This election, however, applied only to gifts made during 1977. *Ibid.*²

²According to the pertinent Committee Reports, the reason for permitting such an election was that "[t]he legislative history [of the 1976 amendment] was somewhat ambiguous and could be read to mean that this exception resulted in the inclusion of only the excess of the estate

In the instant case, decedent made the gifts on January 5, 1978, so the special election of the "subtraction out" method was not available to petitioner. In order to prevail, therefore, petitioner had to demonstrate not only that in 1976 Congress had intended the use of the "subtraction out" method, but also that the application of the 1978 amendment to gifts made prior to its enactment was unconstitutional. In this proceeding brought by petitioner in the Tax Court to redetermine the deficiencies, the Tax Court ruled in favor of the Commissioner. Without reaching the question whether the 1978 amendment could constitutionally be applied to gifts made before it was enacted, the Tax Court held that Section 2035(b)(2) (& Supp. V), as amended by the Tax Reform Act of 1976, allowed the computation of the exclusion only under the "de minimis" method and not under the "subtraction out" method (Pet. App. A-26 to A-27).

The court of appeals affirmed the decision of the Tax Court, but on different grounds. Unlike the Tax Court, the court of appeals agreed with petitioner that the "subtraction out" method was proper under the Tax Reform Act of 1976 (Pet. App. A-4 to A-10). However, the Court held (*id.* at

value of all gifts over the amount excludible under the gift tax annual exclusion." S. Rep. No. 96-498, 96th Cong., 1st Sess. 86-87 (1979). The Reports further noted that while the 1978 amendment clarified the meaning of Section 2035(b)(2) (& Supp. V), it was possible that the ambiguity that existed prior to October 1977 — when the House Committee on Ways and Means first considered the clarifying change in Section 2035(b)(2) (see H.R. 6715, 95th Cong., 1st Sess. § 3(f) (1977); H.R. Rep. No. 95-700, 95th Cong., 1st Sess. 73-74 (1977))—could have caused " * * * gifts [to be] made in excess of \$3,000 based upon the assumption that only the excess of the value over \$3,000 would be included in the gross estate as transfers within 3 years of death." S. Rep. No. 96-498, 96th Cong., 1st Sess. 86-87 (1979); H.R. Rep. No. 96-250, 96th Cong., 1st Sess. 65-66 (1979). Thus, out of a sense of fairness, Congress created this limited exception to the "de minimis" rule for gifts made during 1977.

A-13 to A-14) that the application of the 1978 amendment to the decedent's gifts was not unconstitutional because the 1978 amendment had only enlarged the base of the estate tax.

1. The court of appeals correctly held that the application of Section 2035(b) (& Supp. V), as amended by the Revenue Act of 1978, to the decedent's gifts was constitutional. Even on the assumption that the "subtraction out" method was proper under the Tax Reform Act of 1976, the 1978 amendment adopting the "de minimis" method merely limited the availability of the estate tax exclusion. Thus, while under the "subtraction out" method a portion of each gift in issue was includable in the gross estate, under the "de minimis" method each gift was includable in full. The 1978 amendment therefore did not impose a new estate tax nor did it attempt to impose the estate tax on a wholly new type of property or transaction. As the court of appeals correctly observed (Pet. App. A-13), the 1978 amendment did nothing more than enlarge the base of the estate tax.

Petitioner argues that the "retroactive" application of the 1978 amendment to Section 2035(a) is unconstitutional as applied to the decedent's gifts made earlier that year. But, this Court's decision in *United States v. Darusmont*, 449 U.S. 292 (1981), controls this case and squarely supports the ruling below. At issue in *Darusmont* were the income tax provisions of Sections 56 and 57 of the 1954 Code (& Supp. V), as amended by Section 301 of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1549. The amendment decreased the exemption from the minimum tax and also increased the rate of the minimum tax. The Tax Reform Act of 1976 was approved on November 6, 1976; the minimum tax amendments, however, were effective with respect to "items of tax preference for taxable years beginning after December 31, 1975." See the Tax Reform Act of 1976, Pub. L. No. 94-455, Section 301(g)(1), 90 Stat. 1553.

In *Darusmont*, the taxpayer sold certain property during July 1976, thereby realizing a substantial capital gain. If the Tax Reform Act of 1976 had not been subsequently enacted, he would not have been subject to the minimum tax at all, because his 1976 items of tax preference would not have exceeded the exemption. However, because that exemption was reduced by the Tax Reform Act of 1976, thereby enlarging the tax base, he was required to pay a minimum tax of \$2,280, attributable in full to the July sale. 449 U.S. at 293-294.

A unanimous Court upheld the constitutionality of applying the minimum tax amendment to the taxpayer's sales. As the Court reasoned, the practical problems associated with raising revenue and writing tax legislation require that tax statutes often be given effect prior to the date of enactment; such acts customarily have been given effect as of the beginning of the calendar year of enactment; and that considerations of due process are not offended simply because the taxable event antedates the statute. 449 U.S. at 296-297. *Darusmont* fully applies to this case. Here, as there, Congress enlarged the tax base of an already existing tax. In these circumstances, Congress is empowered to legislate with respect to transactions occurring at any time during the entire year of the enactment. See also *Milliken v. United States*, 283 U.S. 15 (1931) (1918 increase in the rate of the estate tax for gifts made in contemplation of death could constitutionally be applied to gifts made in 1916).³

³Petitioner's reliance (Pet. 9, 14) upon *Helvering v. Helmholz*, 296 U.S. 93 (1935), is misplaced. That case involved an estate tax provision enacted in 1926 that sought to tax the retention of a power to alter, amend or revoke a transfer in trust. The Court held that the powers retained over the trust by the donor did not meet the definition of a power to alter, amend or revoke the trust. 296 U.S. at 96. The Court further stated in dicta, that even if the requisite powers had been retained, the application of the provision to powers retained in 1918,

2. Petitioner further argues (Pet. 10-12) that there was inadequate advance notice of the 1978 amendment. In support of this contention, petitioner relies upon *Untermeyer v. Anderson*, 276 U.S. 440, 445-446 (1928), for the proposition that the consideration of a bill in Congress does not provide adequate notice. *Untermeyer*, however, is distinguishable because it ruled invalid the retroactive application of the first wholly new gift tax enacted in 1924, and not merely a change in the rate or base of an existing tax. See *Milliken v. United States*, 283 U.S. 15, 23 (1931). Moreover, assuming arguendo that notice of a pending change in the law is even relevant to the constitutional question, the Court in *Darusmont* stated that public consideration by Congress of a proposed amendment to an existing tax law is sufficient notice. 449 U.S. at 299. The 1978 amendment at issue here was the subject of public discussion in October 1977, more than a year prior to its enactment. See H.R. 6715, 95th Cong., 1st Sess. § 3(f) (1977); H.R. Rep. No. 95-700, 95th Cong., 1st Sess. 73-74 (1977). Thus, even on the assumption that advance notice is relevant, there was adequate advance notice to donors making gifts in 1978 that Congress was considering a change in the statute.

3. Finally, petitioner contends (Pet. 13-15) that this Court should hear this case in order to clarify its holding in *Untermeyer v. Anderson*, *supra*. Petitioner maintains that subsequent cases, including the decision below, have incorrectly suggested that *Untermeyer* at best remains good law only for the proposition that a wholly new type of tax cannot be applied retroactively. See, e.g., *Westwick v. Commissioner*, 636 F.2d 291, 292 (10th Cir. 1980); *First National Bank in Dallas v. United States*, 420 F.2d 725,

when the trust was established, would have violated the Due Process Clause. This case is distinguishable because the gifts at issue here already were subject in large measure to the estate tax.

730 n.8 (Ct. Cl. 1970); *Sidney v. Commissioner*, 273 F.2d 928 (2d Cir. 1960).

But this reading of *Untermeyer* is fully in accord with *Milliken v. United States*, *supra*, where the Court distinguished *Untermeyer* on the ground that neither the gift tax nor any predecessor thereto was in force at the time of the transfers in question. 283 U.S. at 21. *Untermeyer* is distinguishable from the instant case on precisely the same ground.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1983

APPENDIX

STATUTES AND REGULATIONS

Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)):

Section 2035 [as amended by Section 2001(a)(5), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1848]. ADJUSTMENTS FOR GIFTS MADE WITHIN 3 YEARS OF DECEDENT'S DEATH.

(a) Inclusion of Gifts Made by Decedent. — Except as provided in subsection (b), the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, during the 3-year period ending on the date of the decedent's death.

(b) Exceptions. — Subsection (a) shall not apply to—

* * * * *

(2) any gift excludable in computing taxable gifts by reason of section 2503(b) (relating to \$3,000 annual exclusion for purposes of the gift tax) determined without regard to section 2513(a).

* * * * *

(b) [as amended by Section 702(f)(1) of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2930] *Exceptions.* — Subsection (a) shall not apply —

* * * * *

(2) to any gift to a donee made during a calendar year if the decedent was not required by section 6019 to file any gift tax return for such year with respect to gifts to such donee.

* * * * *

Section 2503. TAXABLE GIFTS.

* * * * *

(b) [as amended by Section 102(a)(3)(B), Excise, Estate, and Gift Tax Adjustment Act of 1970, Pub. L. No. 91-614, 84 Stat. 1839] *Exclusions From Gifts.* — In computing taxable gifts for the calendar quarter, in the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1971 and subsequent calendar years, \$3,000 of such gifts to such person less the aggregate of the amounts of such gifts to such person during all preceding calendar quarters of the calendar year shall not, for purposes of subsection (a), be included in the total amount of gifts made during such quarter.

* * * * *

Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2930:

Section 702. TECHNICAL, CLERICAL, AND CONFORMING AMENDMENTS TO ESTATE AND GIFT TAX PROVISIONS.

* * * * *

(f) Clarification of the \$3,000 Annual Exclusion From the Rule Including in Gross Estate Transfers Within 3 Years of Death. —

(1) Amendment of Section 2035(b). — Subsection (b) of section 2035 (relating to adjustments for gifts made within 3 years of decedent's death) is amended to read as follows:

“(b) Exceptions. — Subsection (a) shall not apply —

* * * * *

3a

"(2) to any gift to a donee made during a calendar year if the decedent was not required by section 6019 to file any gift tax return for such year with respect to gifts to such donee."

* * * * *

(2) Effective Date. — The amendment made by paragraph (1) shall apply to the estates of decedents dying after December 31, 1976, except that it shall not apply to transfers made before January 1, 1977.

Technical Corrections Act of 1979, Pub. L. No. 96-222, 94 Stat. 223.

Section 107. AMENDMENTS RELATED TO TITLE VII.

(a) In General. —

* * * * *

(2) Amendments related to section 702 of the act.—

* * * * *

(F)(i) If the executor elects the benefits of this subparagraph with respect to any estate, section 2035(b) of the Internal Revenue Code of 1954 (relating to adjustments for gifts made within 3 years of decedent's death) shall be applied with respect to transfers made by the decedent during 1977 as if paragraph (2) of such section 2035(b) read as follows:

"(2) to any gift to a donee made during 1977 to the extent of the amount of such gift which was excludable in computing taxable gifts by reason of section 2503(b) (relating to \$3,000 annual exclusion for purposes of the gift tax) determined without regard to section 2513(a)."

4a

(ii) The election under clause (i) with respect to any estate shall be made on or before the later of —

(I) the due date for filing the estate tax return, or

(II) the day which is 120 days after the date of the enactment of this Act.

* * * * *